

**United States Department of Labor
Employees' Compensation Appeals Board**

T.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
East Hampton, NY, Employer**

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**Docket No. 16-1130
Issued: September 11, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 6, 2016 appellant filed a timely appeal from a March 22, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated August 10, 2015 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant timely requested an oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated November 25, 2016, the Board denied the request for oral argument as the issue on appeal could be fully addressed on the record. *Order Denying Request for Oral Argument*, Docket No. 16-1130 (issued November 25, 2016).

On appeal appellant contends that he suffered from post-traumatic stress disorder causally related to working for 24 years as a letter carrier. He stated that his claim had been improperly rescinded in 2015.

FACTUAL HISTORY

This case has previously been before the Board on prior appeal.³ The facts as set forth in the prior decision are hereby incorporated by reference. The relevant facts are as follows.

On May 21, 2009 appellant, then a 49-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging post-traumatic stress disorder (PTSD) due to factors of his federal employment. In a statement dated June 24, 2009, he explained that he had been arrested in March 2006 for allegedly damaging the vehicle of a coworker. Appellant alleged that he experienced anguish, anxiety, nausea, and other symptoms due to the false accusation and his subsequent arrest. He resigned on June 22, 2006.

OWCP initially denied appellant's claim on November 5, 2009 finding that appellant had not established that the employment incident occurred in the performance of duty as alleged.

On December 17, 2009 appellant requested reconsideration. By decision dated March 8, 2010, OWCP modified the denial of the claim, finding that appellant's occupational disease claim was untimely filed.

On April 2, 2010 appellant again requested reconsideration. He argued that the employing establishment knew that he was ill due to his March 2006 arrest and that he had asked for time off before resigning. Appellant also contended that he was unaware that he had PTSD until he was diagnosed with that condition in June 2006. OWCP denied appellant's reconsideration request on June 10, 2010, finding that he had not raised legal contentions or submitted relevant and pertinent new evidence warranting merit review.

Appellant appealed to the Board on September 20, 2010. By September 28, 2011 decision, the Board set aside the June 10, 2010 decision remanding the case for further merit review. The Board noted that appellant's argument that the employing establishment timely knew of his injury presented a legal premise with some reasonable color of validity.⁴

On remand OWCP again denied appellant's claim in a decision dated February 2, 2012. Appellant requested reconsideration on July 30, 2012. OWCP reviewed the merits of the claim, but denied modification on September 25, 2012.

Appellant again requested reconsideration on January 18, 2013 and submitted a report from Clinical Psychologist Mary Ann Juliano, dated January 11, 2011.

By decisions dated March 20, 2013, OWCP vacated the February 2, 2012 decision and accepted appellant's occupational disease claim. It determined that the medical evidence of

³ Docket No. 10-2336 (issued September 28, 2011).

⁴ *Id.*

record established PTSD causally related to the factors of an employment incident of June 23, 2006.

Appellant submitted claims for wage-loss compensation (Form CA-7) for the period June 23, 2006 to December 31, 2011. On July 31, 2013 OWCP denied appellant's claim for wage-loss compensation.

Appellant requested a hearing before an OWCP hearing representative on August 13, 2013. On September 5, 2014 the hearing representative affirmed the July 31, 2013 OWCP decision, noting that the evidence of record suggested that appellant's claim was untimely filed as the postmaster had denied discussing the March 2006 arrest with appellant as a possible emotional condition claim.

On March 24, 2015 OWCP proposed to rescind the acceptance of appellant's claim. It noted that the evidence of record established that appellant was ultimately charged by the State of New York with criminal mischief with regard to vandalizing his coworkers' vehicle. OWCP indicated that the evidence did not support that appellant was falsely accused of vandalism, nor was the evidence now sufficient to establish that any incident occurred within the performance of duty. It noted that there was no evidence that the employing establishment was on notice at the time of his resignation of a work-related injury, and that this would suggest that the claim was untimely filed. OWCP noted that the proposed rescission would affect both medical benefits and wage-loss compensation benefits.

Appellant submitted no additional evidence in response to the proposed rescission of benefits. By decision dated April 27, 2015, OWCP rescinded the acceptance of appellant's claim effective that date.

By letter dated April 8, 2015 and received by OWCP on May 12, 2015, appellant indicated his disagreement with the proposal to rescind the approval of his claim. He alleged that there were many witnesses to the incident, that he did not perform the alleged act, and that the incident happened in the performance of duty. Appellant contended that his supervisor drove him to the police station to be arrested. He indicated that his resignation letter explained that he was resigning due to the incident. Appellant alleged that he would not have resigned from his job of 24 years had the incident never happened.

On August 10, 2015 OWCP reviewed appellant's claim on the merits, but denied modification of the April 27, 2015 decision. It noted that appellant's claim was properly rescinded because the evidence received subsequent to the acceptance of appellant's claim established that appellant's claim was untimely filed. OWCP also found that the evidence of record established that appellant was convicted of a crime and; therefore, the evidence failed to establish that appellant was falsely accused.

By letter dated October 6, 2015, Colin Asterita, Esq., provided a witness statement in which he related that he represented appellant with regard to the misdemeanor charge of criminal mischief, that the case was dismissed, and that there was no conviction or guilty plea of any kind. He also noted that the case was now sealed pursuant to statutory law. Attorney Asterita argued that OWCP was under the mistaken impression that appellant had been convicted of the charge.

A certificate of disposition indicated that the charges of criminal mischief resulting from appellant's March 17, 2006 arrest were dismissed.

By letter dated December 24, 2015, appellant argued that his supervisor at the time of the incident had driven him to the police station. He indicated that his supervisor was unable to submit a witness statement because human resources would not allow him to do so. Appellant contended that his claim was timely filed because he was not aware of his occupational disease until June 2006 and therefore his claim filed on May 10, 2009 was timely. He also alleged that he had not committed a criminal act, but was falsely accused of doing so while performing his normal duties as a letter carrier. Appellant submitted a copy of a portion of an article from an unidentified newspaper indicating that he allegedly pushed a mail cart into another employee's car and was arrested and charged with fourth-degree criminal mischief.

By decision dated March 22, 2016, OWCP denied appellant's request for reconsideration without conducting a merit review. It determined that the evidence of record was insufficient to warrant review of the August 10, 2015 decision.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁷

ANALYSIS

The Board finds that OWCP reviewed appellant's request for reconsideration under the appropriate criteria for timely filed requests for reconsideration, and determined that appellant had not shown that OWCP erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by OWCP, and did not submit relevant and pertinent new evidence not previously considered by OWCP.

The Board finds that the arguments made by appellant on reconsideration are cumulative, duplicative, or repetitive in nature and are insufficient to warrant reopening a claim for merit review.⁸ In the last merit decision, OWCP found that appellant's claim was denied because it was untimely filed. The underlying issue in this case is whether appellant has established that the claim was timely filed.

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608(b).

⁸ *Denis M. Dupor*, 51 ECAB 482 (2000).

The claim centered on an incident that allegedly occurred in March 2006 when appellant claimed to have been falsely accused of a crime by a coworker and was arrested. Appellant did not file his claim until May 21, 2009, or over three years after the alleged incident. He has argued on numerous occasions that the employing establishment knew about his emotional injury prior to the date that he resigned on June 22, 2006 or, in the alternative, that he did not become aware of his emotional condition until June 2006. OWCP has repeatedly rejected these arguments. Accordingly, appellant's statement on reconsideration that his supervisor was aware of the injury in a timely fashion and that he did not know of his injury until June 2006 are not relevant new legal arguments. He has not established that OWCP erroneously applied or interpreted a specific point of law and he has not advanced a relevant new legal argument.⁹ Appellant's arguments are duplicative.

Appellant also failed to submit any relevant and pertinent new evidence. The newspaper article submitted on reconsideration was previously of record and considered by OWCP in its August 10, 2015 decision. The Board has held that evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹⁰

Appellant also submitted a witness statement on October 6, 2015 from Mr. Asterita, Esq., who had represented appellant in his criminal case.¹¹ Mr. Asterita, Esq., provided a certificate of disposition indicating that the criminal case against appellant was dismissed. However, the underlying issue in this case is whether appellant's claim was timely filed. Evidence that does not address the particular issue involved does not constitute a basis for reopening a claim.¹² As this evidence does not address the underlying issue that appellant's claim was untimely filed, it is not pertinent new evidence.

Accordingly, as appellant has not met any of the criteria warranting reopening his claim for further merit review, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

⁹ See *L.D.*, Docket No. 14-0205 (issued April 7, 2014).

¹⁰ *C.W.*, Docket No. 16-1137 (issued December 19, 2016).

¹¹ The Board notes that this letter did not constitute a request for reconsideration of OWCP's August 10, 2015 merit decision because appellant's counsel of record before OWCP was Glenn Smith. Mr. Asterita, Esq., was never authorized to represent appellant before OWCP. There is no evidence of record that Mr. Asterita, Esq., was appellant's authorized representative before OWCP on October 6, 2015. *R.D.*, Docket No. 16-894 (issued October 3, 2016). OWCP's regulations at 20 C.F.R. § 10.700 provides: "(a) The claims process under FECA is informal. Unlike many workers' compensation laws, the [employing establishment] is not a party to the claim, and OWCP acts as an impartial evaluator of the evidence. Nevertheless, a claimant may appoint one individual to represent his or her interests, but the appointment must be in writing." ... (c) A properly appointed representative who is recognized by OWCP may make a request or give direction to OWCP regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on facts or the law, and obtaining information from the case file, to the same extent as the claimant."

¹² *P.M.*, Docket No. 15-1902 (issued January 28, 2016).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 22, 2016 is affirmed.

Issued: September 11, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board